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No. 85-609.

In The

Supreme Court of the United States.

October Term, 1985.

JOSEPH F. WANSONG,
PETITIONER,

v.

EDWARD F. HENNESSEY,
CHIEF JUSTICE, SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS, AND
ELIZABETH A. WANSONG,
RESPONDENTS.

Respondent Elizabeth A. Wansong's Brief in Opposition to Joseph F. Wansong's Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

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Questions Presented for Review.

I. Whether the trial court properly dismissed a litigant's Complaint for Divorce as a sanction for his invocation of his rights under the Fifth Amendment to the United States Constitution to refuse to answer questions during a pre-trial discovery deposition.

II. Whether the trial court properly refused to allow a litigant to introduce certain testimonial and documentary evidence as a discovery sanction for his invocation of his Fifth Amendment rights, under the United States Constitution, in refusing to answer questions during a pre-trial deposition.

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Citation to Opinion Below.

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at 395 Mass. 154, 478 N.E.2d 1270 (1985). The Supreme Judicial Court's decision is reproduced as Appendix "A" in Joseph F. Wansong's Petition for Writ of Certiorari.

Constitutional Provisions Involved.

CONSTITUTION OF THE UNITED STATES, AMENDMENT V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case.

On or about March 3, 1983, Joseph F. Wansong, the husband (hereinafter referred to as "the Petitioner") filed a Complaint for Divorce with the Essex County Probate and Family Court, Commonwealth of Massachusetts, alleging an irretrievable breakdown of the marriage. On or about April 22, 1983, Elizabeth A. Wansong, wife (hereinafter referred to as "the Respondent") filed a Complaint for Divorce with the Essex County Probate and Family Court, Commonwealth of Massachusetts, alleging cruel and abusive treatment by the Petitioner.

In their Complaints, both parties requested affirmative relief. The Petitioner requested: a divorce; that the Respondent be granted custody of the parties' two minor children; that the

court convey to him the parties' marital home; and that the court order a distribution of marital assets pursuant to M.G.L. c. 208, Section 34.

In her Complaint, the Respondent requested: a divorce; an order prohibiting the Petitioner from imposing any restraint on her personal liberty; custody of the parties' two minor children; support for herself and the children; conveyance to her of the parties' marital home; and a division of marital assets pursuant to M.G.L. c. 208, Section 34.

On June 13, 1983, the deposition of the Petitioner was commenced by the Respondent's counsel. At the time of the taking of such deposition, the Petitioner refused to answer numerous questions relating to: his relationship with a certain woman; his ownership of assets with said woman; his contribution to said woman's support; said woman's contribution to the Petitioner's living expenses; the extent of gifts received from said woman; the Petitioner's travel with said woman; and the Petitioner's conduct relating to his involvement with said woman.

At the time of the taking of his deposition, the Petitioner was represented by counsel. In each instance that he refused to answer a question, it was upon advice of counsel and upon the asserted ground of his privilege against self-incrimination under the Fifth Amendment to the United States Constitution and Article 12 of the Declaration of Rights of the Massachusetts Constitution (reproduced in the Appendix to this Brief).

On June 17, 1983, the Petitioner filed with the trial court a Motion for Protective Order.

On June 20, 1983, the Respondent filed various discovery motions including a Motion to Compel Answers at Deposition and for Sanctions.

On June 23, 1983, the trial court granted the Respondent's Motion to Compel and entered an order as follows:

> Joseph F. Wansong, Plaintiff is ordered to resume his deposition and to respond to questions which he previously refused to answer and other such questions that may be posed relating to those issues.

The parties entered into a Stipulation of Facts which was presented to the trial court. In essence, the Petitioner stated that despite the trial court's order of June 23, 1983, he still refused to answer the questions ordered to be answered, based upon his assertion of his Fifth Amendment rights under the United States Constitution and his other rights under Article 12 of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts.

On September 21, 1983, a hearing was held by the trial court on the following motions:

- Respondent's Motion to Dismiss the Petitioner's Complaint for Divorce;
- Respondent's Motion to Prohibit the Petitioner's Testimony or Introduction of Evidence at Trial;
- Respondent's Motion to Strike Financial Statement and Testimony of the Petitioner; and
- Petitioner's Motion for a Protective Order.

Based upon the Stipulation of Facts, the Petitioner's deposition, court pleadings and argument of counsel, the trial court issued a fourteen (14) page "Memorandum and Order" on the various Motions on October 17, 1983. The trial court's decision is reproduced as Appendix "B" in Joseph F. Wansong's Petition for Writ of Certiorari.

In essence, the trial court imposed the following sanctions upon the Petitioner for his failure to comply with pre-trial discovery orders:

(a) the Respondent's "Motion to Dismiss Complaint for Divorce" was allowed and the Petitioner's divorce action was dismissed;
(b) the Petitioner was prohibited from introducing evidence, documentary or testimonial, relating to the issues of: conduct; station; amount and sources of income; employability; estate; liabilities and needs; contribution to the acquisition, preservation or appreciation in the estate; opportunity to acquire future capital, assets or income; and contribution as a homemaker, as provided in M.G.L., c. 208, Section 34 (reproduced in the Appendix to this Brief);
(c) The financial statements filed with the trial court by the Petitioner were struck, and the Petitioner was prohibited from testifying about: his financial circumstances; conduct of the parties during the marriage; his station; amount and sources of income; employability; his estate; liabilities and needs; opportunity for future acquisition of capital, assets and income; his contributions to the acquisition, preservation or appreciation of their estate; and his contribution as a homemaker;
(d) the Petitioner's request for a protective order was denied.

The Petitioner timely claimed appeals from the various rulings. The trial court agreed to reserve and report the correctness of its decisions to the Appeals Court of the Commonwealth of Massachusetts.

The Supreme Judicial Court of Massachusetts, sua sponte, had the cases transferred to its own calendar for argument. The cases were argued on March 8, 1985, and a decision was rendered June 11, 1985.

The decision of the Supreme Judicial Court upheld the rulings of the Trial Judge and remanded the cases to the trial court for further proceedings consistent with its opinion.

Reasons Why Joseph F. Wansong's Petition for Writ of Certiorari Should be Denied.

I. The Supreme Judicial Court of the Commonwealth of Massachusetts' Decision in *Wansong* v. *Wansong* is Consistent with the Decisions of Other State Courts of Last Resort.

Joseph F. Wansong's petition for Writ of Certiorari should be denied as the Supreme Judicial Court's decision in *Wansong* v. *Wansong*, 395 Mass. 154, 478 N.E.2d 1270 (1985) is not in conflict with the reported decisions of other courts of last resort. Sup. Ct. R. 17.1(b). To the contrary, those courts having ruled upon the issues at bar have uniformly upheld, as did the Supreme Judicial Court of Massachusetts in this case, the constitutionality of the imposition of various discovery sanctions upon a party litigant.

In *Christenson* v. *Christenson*, 281 Minn. 507, 162 N.W.2d 194 (1968) the Supreme Court of Minnesota sustained the action of the trial court in dismissing a divorce action when the plaintiff refused to waive her privilege against self-incrimination. The court held that "[w]hile plaintiff cannot be compelled to waive her privilege against self-incrimination in this divorce action, as in any other civil action, she must either

waive it or have her action dismissed." *Christenson* at 524. Similarly, the Supreme Court of Florida has sustained dismissals of divorce actions when a party has asserted his/her Fifth Amendment rights. *Stockham* v. *Stockham*, 168 So.2d 320 (Fla. 1964); *Minor* v. *Minor*, 240 So.2d 301 (Fla. 1970).

Moreover, the courts have held that where a party has refused to testify during the discovery phase of litigation, it is appropriate to bar their testimony at trial. *Meyer* v. *The Second Judicial District Court*, 95 Nev. 176, 591 P.2d 259 (1979); *Mahne* v. *Mahne*, 66 N.J. 53, 328 A.2d 225 (1974); *Franklin* v. *Franklin*, 365 Mo. 442, 283 S.W.2d 483 (1955). Most recently, the Rhode Island Supreme Court stated in *Pulawski* v. *Pulawski*, 463 A.2d 151 (R.I. 1983) that "[w]hen the court deals with private litigants, the privilege against self-incrimination must be weighed against the right of the other party to due process and a fair trial. The shield of the privilege must not be converted into a sword." 463 A.2d at 157 (citing *Brown* v. *United States*, 356 U.S. 148 [1958]).

The Supreme Judicial Court of the Commonwealth of Massachusetts' decision in this case was consistent with the decisions of other courts of last resort which have ruled on these issues.

II. The Supreme Judicial Court of the Commonwealth of Massachusetts' Decision in *Wansong* v. *Wansong* is Wholly Consistent With Prior United States Supreme Court Decisions.

The Petitioner contends that the decision of the Supreme Judicial Court of Massachusetts regarding severity of the penalties for invoking the Fifth Amendment conflicts with the prior United States Supreme Court decisions in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Spevack* v. *Klein*, 385 U.S. 511

(1967); and *Gardner* v. *Broderick*, 392 U.S. 273 (1968). *See*: Petitioner's Petition for a Writ of Certiorari, at 5.

All of the foregoing cases related to the imposition of direct sanctions upon a party for asserting his privilege against self-incrimination. In *Spevack*, a lawyer was disbarred as a result of his refusing, on self-incrimination grounds, to answer questions relating to professional misconduct. In *Garrity*, a police officer was threatened with discharge if he refused to answer questions concerning ticket fixing. In *Gardner*, it was held that a provision of the New York City Charter which required the discharge of a police officer who refused to answer questions concerning bribery and corruption on grounds of self-incrimination was unconstitutional. Of the aforementioned cases, none arose in the present context of private litigation between private parties in which noncriminal sanctions are imposed to aid in orderly pre-trial discovery.

Moreover, although the language of *Garrity* and *Spevack* did suggest expansively that no sanctions which make the exercise of the privilege against self-incrimination costly may be imposed, this Court no longer embraces that expansive approach, but has sought to strike a suitable balance designed to protect the pertinent public and private interests. *See: Gardner* v. *Broderick*, 392 U.S. 273. In the present case, Respondent would suffer substantial prejudice in defending against the Petitioner's divorce action and prosecuting her own divorce action if the Petitioner were allowed to assert a privilege against self-incrimination.

Accordingly, the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts is consistent with prior Supreme Court decisions. Sup. Ct. R. 17.1(c).

Conclusion.

For the aforementioned reasons, Respondent requests that this Honorable Court deny Joseph F. Wansong's Petition for Writ of Certiorari.

Respectfully submitted,

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Appendix.

CONSTITUTION OF MASSACHUSETTS.

Art. XII. Regulation of prosecutions; right of trial by jury in criminal cases

ART. XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

MASSACHUSETTS GENERAL LAWS.

Chapter 208.

§ 34. Alimony or assignment of estate; determination of amount; health insurance

Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdic-

tion over both parties, may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit. When the court makes an order for alimony on behalf of a spouse, and such spouse is not covered by a private group health insurance plan, said court shall determine whether the obligor under such order has health insurance on a group plan available to him through an employer or organization that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of such spouse.

SUPREME COURT RULES.

Part V — Jurisdiction on Writ of Certiorari.

Rule 17. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but a judicial discretion, and will be granted only when there

are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

. . . . . .

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.